

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERMAINE BROWN,

Defendant-Appellant.

UNPUBLISHED

September 18, 2003

No. 239036

Saginaw Circuit Court

LC No. 01-020358-FC

Before: Sawyer, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for unlawfully carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm by a felon, MCL 750.224f, for which he was sentenced to concurrent terms of 80 months to 120 months' imprisonment. We affirm.

I. Sufficiency of the Evidence

Defendant first argues the prosecution failed to present any proof that defendant concealed a weapon on his person. The elements of CCW require that (1) the defendant carried a gun and (2) the gun was concealed on or about his person. MCL 750.227; *People v Davenport*, 89 Mich App 678, 682; 282 NW2d 179 (1979). In ruling on a motion for a directed verdict, a trial court must consider the evidence presented up to the point that the motion is made in a light most favorable to the prosecution, and to determine whether a rational trier of fact could find the essential elements of the crime have been proved beyond a reasonable doubt. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). Circumstantial evidence and reasonable inferences arising therefrom can constitute satisfactory proof of the elements of a crime. *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

The issue of concealment is a question of fact determined on a case-by-case basis by the trier of fact. *People v Reynolds*, 38 Mich App 159, 161; 195 NW2d 870 (1972). "A weapon is concealed if it is hidden from the ordinary observation of persons in the ordinary and usual associations of life." *Id.* Two independent witnesses testified that six hours before the murder, defendant was in possession of a large silver revolver. Therefore, sufficient evidence was presented from which a reasonable trier of fact could have concluded defendant possessed and carried a revolver on or about his person.

II. Request for a Mistrial

Defendant next argues the trial court abused its discretion by denying his request for a mistrial based on witnesses' reference to defendant's prior imprisonment. The decision to grant or deny a mistrial rests in the sound discretion of the trial court. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). "A mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992).

The first incident occurred during questioning by defense counsel when a witness stated defendant had been to her house "sometime after he got out of prison." Defendant requested a mistrial because of the witness's response. The court denied the motion, and concluded that the reference was not egregious enough to require a mistrial. The second instance occurred when a witness was questioned by the prosecutor and, in an unresponsive answer, testified that defendant told her he had been locked up. Defendant again asked for a mistrial, but the request was again denied.

As the trial court noted, volunteered and unresponsive answers to proper questions are generally insufficient for granting a mistrial. *People v Kelsey*, 303 Mich 715, 717; 7 NW2d 120 (1942); *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). Hence, where a witness provides an unresponsive answer and there is no indication that the prosecutor played a role in encouraging the witness to give the response, a mistrial is generally not required. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Because the two isolated comments were made on the fourth day of an eight-day trial, it is highly unlikely defendant suffered significant prejudice. Moreover, the responses were not related to the questions asked, and the prosecutor in no way played a role in eliciting the one response. The trial court, therefore, did not abuse its discretion by denying defendant's requests for a mistrial.

III. Felon In Possession of a Firearm

Defendant next argues the trial court abused its discretion in denying his motion for acquittal on the felon in possession of a firearm charge notwithstanding the verdict. The elements of felon in possession of a firearm require that: (1) the defendant possessed a firearm, (2) the defendant was convicted of a felony, and (3) less than five years had elapsed since the defendant served the prison term imposed for the conviction of the felony and successfully completed all conditions of his parole. MCL 750.224f(2).

During trial, defendant stipulated as follows with respect to this charge: "We are stipulating to the prior *record*, yes, Judge." (Emphasis added.) Sufficient evidence was also introduced to show defendant was in possession of a firearm. Therefore, the combination of defendant's stipulation and the evidence showing he was in possession of the firearm was sufficient to convict defendant and to require denial of defendant's motion. Although defendant asserts that he only stipulated to the fact that he had been convicted of a prior "felony," the record belies such an assertion. Stipulating to defendant's prior "record" allowed the trial court to instruct the jury as it did, for defendant's "record" would necessarily include the date on which he was convicted of the felony. See Black's Law Dictionary (1989), p 1279.

IV. Sentencing Issues

Defendant next argues the trial court abused its discretion in scoring offense variables (OV) 1, 3, and 9, because the court wrongly considered the homicide offense of which defendant had been acquitted. On appeal, if there is any supporting evidence for the scoring decisions they will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996); *People v Watkins*, 209 Mich App 1, 5; 530 NW2d 111 (1995). For OV 1, the instructions provide for the scoring of five points if a weapon is displayed or implied. MCL 777.31(1)(e). The record contains the testimony of two witnesses who observed defendant with a weapon six hours before the victim was shot. Therefore, sufficient evidence was presented that defendant had displayed a weapon.

Defendant also contends the trial court erred in scoring OV 3 at one hundred points because there was no “victim” of his sentencing offenses of CCW and felon in possession. The instructions provide that one hundred points should be scored if death results from the commission of a crime and homicide is not the sentencing offense. MCL 777.33(2)(b). Where, as here, the statute is unambiguous, it must be enforced as written, with every word accorded its plain meaning. *People v Stone*, 463 Mich 558, 563; 621 NW2d 702 (2001). The trial court did not err in scoring defendant one hundred points for OV 3 because the sentencing offense was not a homicide and the victim’s death did result from the commission of a crime.

Defendant also challenges the trial court’s scoring of OV 9. According to MCL 777.39, OV 9 is scored ten points if two to nine victims were involved. The instructions state that “each person who was placed in danger of injury or loss of life” is counted as a victim. MCL 777.39(2)(a). Here, the trial court properly scored ten points because two witnesses were placed in danger when they were forced to flee the victim’s residence at the time the victim was shot. Therefore, the trial court did not abuse its discretion in scoring OV 9 because there was evidence supporting the scoring.

Lastly, defendant argues the sentences should be vacated and that this case should be remanded for resentencing because the court improperly considered defendant’s previous offenses, which were already calculated under the sentencing guidelines. A trial court may impose a sentence that departs from the sentencing guidelines only if the court has a substantial and compelling reason to do so. The reason stated must be objective and verifiable and must keenly grab this Court’s attention. *People v Babcock*, __ Mich __, 666 NW2d 231 (2003), slip op at 9. The trial court must state its reasons for departure on the record. *Id.* at 10. This Court, on review, must also determine “whether the sentence is proportionate to the seriousness of the defendant’s conduct and to the defendant in light of his criminal record.” *Id.* at 14-15.

In the present case, the court noted that defendant had two previous felonies and six previous misdemeanor convictions, most of which involved a threat to the public. In addition, the trial court emphasized that defendant’s probation and parole had been repeatedly revoked because of his inability to “follow the rules,” and that defendant had committed the crimes in this case only one month after being discharged from prison. In applying the *Babcock* standard of review, we conclude that the trial court did not err in its upward departure from the guidelines. Each of the reasons stated by the trial court on the record were objective and verifiable, and given the facts of this case, “keenly grabbed” our attention. *Babcock, supra*. Likewise, also in light of the facts and circumstances of the crime, the sentence was proportionate. *Id.*

Affirmed.

/s/ David H. Sawyer

/s/ Joel P. Hoekstra

/s/ Christopher M. Murray